Postal Regulatory Commission
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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

STATUTORY REVIEW OF THE SYSTEM FOR REGULATING RATES AND CLASSES FOR MARKET DOMINANT PRODUCTS	)))	Docket No. RM2017-3

MOTION OF
MPA—THE ASSOCIATION OF MAGAZINE MEDIA
AND ALLIANCE OF NONPROFIT MAILERS
FOR RECONSIDERATION OF ORDER NO. 3763

(February 6, 2017)

MPA-The Association of Mailers ("MPA") and Alliance of Nonprofit Mailers ("ANM") respectfully move for reconsideration of Order No. 3763. In that order, the Commission denied the January 17 and January 25 motions of MPA and ANM for issuance of information requests on the ground that the Commission "did not contemplate discovery within this proceeding, and its view remains unchanged at this time." *Id*. at 3.

The undersigned parties do not seek reconsideration of this ruling lightly. Without obtaining the requested information and making it available to interested parties for comment, however, the Commission cannot make legally valid findings on whether the current regulatory system will allow the Postal Service to earn revenues that satisfy the objectives of 39 U.S.C. §§ 3622(b)(1), (5), and (8). Without discovery, any Commission findings in phase 1 on this threshold issue will likely need be relitigated later. The resulting duplication of effort would waste the resources of the Commission and the parties before it and delay the ultimate resolution of this case, thus conflicting with the Commission's

stated "needs in conducting this important review, including key time considerations and resource constraints." Order No. 3766 at 7.[1]

I. THE ADMINISTRATIVE PROCEDURE ACT REQUIRES THE COMMISSION TO OBTAIN THE INFORMATION REQUESTED BY THE MAILERS BEFORE DECIDING WHETHER THE CURRENT REGULATORY SYSTEM SATISFIES 39 U.S.C. §§ 3622(b)(1), (5) AND (8).

The grounds offered by Commission for denying both the January 17 and January 25 information requests appear in the second and third paragraphs on page 3 of Order No. 3763. We quote them in full:

> Given the unique nature of this docket and the statutory requirement that the Commission review the system for regulating rates and classes for market dominant products, the Commission does not view this stage of the docket as a litigated proceeding, but (as Order No. 3673 contemplates and 39 U.S.C. § 3622(d)(3) requires) an opportunity for the Commission to seek and consider public comment prior to making its initial determinations of whether the system is meeting the objectives, considering the factors. The Commission did not contemplate discovery within this proceeding, and its view remains unchanged at this time. If, however, the Commission later determines that additional information is necessary to facilitate its review, it will consider requesting such information in accordance with its regulations.

[1] This motion is properly before the Commission. 39 C.F.R. § 3001.21(a) authorizes parties to apply by motion for any relief "not otherwise specifically provided for in this part." The Commission has reached the merits of motions for consideration of its own orders when fairness or judicial economy warrant. *See*, *e.g.*, Order No. 3441 in Docket No. R2013-R, *Notice of Market-Dominant Price Adjustment* (July 20, 2016) (reaching merits of USPS motion for reconsideration); Order No. 2980 in Docket No. CP2016-9, *Competitive Products Price Changes Rates of General Applicability* (January 5, 2016) (reaching merits of David B. Popkin motion for reconsideration); Order No. 2512 in Docket No. C2013-10, *Complaint of American Postal Workers Union, AFL-CIO* (May 27, 2015) (reaching merits of APWU motion for reconsideration); Order No. 2460 in Docket No. C2015-1, *Complaint of Center for Art and Mindfulness, Inc. and Norton Hazel* (April 23, 2015) (reaching merits of complainants' motion for reconsideration); Order No. 1807 in Docket No. C2009-1R, *Complaint of GameFly, Inc.* (August 13, 2013) (reaching merits of USPS motion for reconsideration).

> Additionally, the Commission notes the Postal Service's representation that some information sought by the Joint Movants in the First Motion is generally publicly available. See Response at 2.

We understand these paragraphs to make essentially three arguments: (1) this phase of the case is not a "litigated proceeding" in some sense that the Commission has not identified but apparently regards as meaningful; (2) the Commission's failure to issue the information requests is harmless because, if the Commission later decides that some or all of the requested information is necessary to decide the case, the Commission will "consider" requesting the information; and (3) the Postal Service has "represent[ed]" that "some" of the requested information is publicly available. We respond to the first and third arguments in this section, and the second argument in Section II below.

A. The Commission Cannot Lawfully Find That The Current Regulatory System Revenue Allows the Postal Service Too Little Revenue To Satisfy Objectives 1, 5 And 8 Without First Obtaining And Allowing Interested Parties To Comment On The Information Sought By The Proposed Information Requests.

The notion that phase 1 of this case is not a "litigated proceeding" is puzzling. The Commission cites no authority for this characterization, and neither the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706, nor the Postal Accountability and Enhancement Act of 2006 ("PAEA") distinguish between "litigated" and non-litigated administrative proceedings before the Commission or other regulatory agencies. Moreover, the Commission has repeatedly characterized administrative proceedings before it as "litigation" or "litigated."[2] This case certainly is "litigated" in the generally

[2] *See*, *e.g.*, Order No. 1739 in Docket No. RM2013-4, *Rules Pursuant to 39 U.S.C. 404a* (June 5, 2013) at 18-19; Order No. 1450 in Docket No. MC2004-3, *Rate and Service Changes to Implement Functionally Equivalent Negotiated Service Agreement with Bank*

accepted sense of "contested" or "disputed." 8 Oxford English Dictionary 1037 (2d ed. 1989). The Postal Service has made clear that it intends to argue in this proceeding that the CPI cap of 39 U.S.C. § 3622(d) has not allowed (and will not allow) the Postal Service to collect enough money from market-dominant mailers to attain revenue adequacy and satisfy the objectives of 39 U.S.C. § 3622(b). The undersigned parties intend to argue to the contrary. This dispute is not merely academic or theoretical: a Commission decision in the Postal Service's favor could lead to large—indeed, multi-billion dollar—annual postage increases for market dominant mailers.

Perhaps the Commission meant the term "litigated proceeding" as a synonym for an on-the-record formal adjudication under 5 U.S.C. § 554, as distinguished from an informal adjudication or rulemaking under 5 U.S.C. § 553, on the assumption that parties are entitled to engage in traditional discovery only in the first kind of proceeding. *See*, *e.g.*, *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 557-58 (1978). But this distinction also cannot uphold the Commission's failure to seek the requested information itself.

Even in informal proceedings, the Administrative Procedure Act requires that agencies base their actions on findings that are adequately reasoned and consistent with the relevant data. Section 10(e) of the APA, codified at 5 U.S.C. § 706 and incorporated by reference in 39 U.S.C. § 3663, requires that agency action be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "short of statutory right," or "without observance of procedure required by law." 5 U.S.C.

One Corporation (Jan. 6, 2006); Order No. 1386 in Docket No. RM2003-3, *Final Rule on Periodic Reporting Requirements* (November 3, 2003) at 32, 36-38; 3, 6-8, 14-16, 23, 33, 38, 39, 45, 49-50, 56, 59, 62-63, 66-67, 71, 73-75, 77.

§ 706(2)(A), (C)–(E). The "arbitrary and capricious" standard requires an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation omitted).

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 43.

Under *State Farm*, an agency decision is arbitrary and capricious if (1) the reviewing court cannot "discern a reasoned path from the facts and considerations before the [agency] to the decision it reached'"; (2) the agency's findings are unsupported by "'[such] relevant evidence as a reasonable mind might accept as adequate to support a conclusion'"; (3) the result reached is internally inconsistent or "illogical on its own terms"; or (4) the agency has "'fail[ed] to respond meaningfully' to objections raised by a party." *Am. Fed'n of Gov't Emps. v. FLRA*, 470 F.3d 375, 380 (D.C. Cir. 2006) (citations omitted); *AEP Tex. N. Co. v. STB*, 609 F.3d 432, 441–44 (D.C. Cir. 2010); *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 216 (D.C. Cir. 2011); *LePage's 2000*, *Inc. v. PRC*, 642 F.3d 225, 230–31, 234 (D.C. Cir. 2011); *GameFly, Inc. v. PRC*, 704 F.3d 145, 148–49 (D.C. Cir. 2013); *BNSF Ry. Co. v. STB*, 741 F.3d 163, 168 (D.C. Cir. 2014).

Moreover, the APA also requires that interested parties have an adequate opportunity to comment on the relevant data before the Commission makes its findings.

"Consequently, the notice required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule *and the data upon which that rule is based*." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (emphasis added). Hence, the Commission must obtain the relevant data from the Postal Service through *some* means, whether traditional discovery requests, subpoenas, or Commission-issued information requests.

The Commission cannot satisfy these standards in the present case without the factual information covered in the mailers' proposed information requests. First, the parties cannot intelligently comment on, and the Commission cannot meaningfully assess, when (if at all) the Postal Service's expected future liabilities to its retirees will exhaust the Postal Service's available assets without knowing, *inter alia*, when and in what amounts those liabilities will come due. Answering those questions requires the information identified in proposed questions 1 through 8 of the January 17 information requests. *See* Reply of MPA, ANM and PostCom (January 27, 2017) at 7-8.[3]

Similarly, to obtain a realistic estimate of the funds that the Postal Service could raise by selling surplus real estate (or engaging in sale-leaseback transactions), the Commission and commenting parties need to know what the real estate could be sold for today, not what the Postal Service paid for the real estate years or decades ago, let alone the residual portion of the historical cost after application of arbitrary depreciation schedules. Questions 9 and 10 of the January 17 information requests seek to elicit this information. Reply of MPA, ANM and PostCom at 9-11.

[3] To preserve the record for potential judicial review, we specifically incorporate the January 27 reply by reference.

Likewise, to make an informed judgment about the Postal Service's labor costs, the Commission and commenting parties need to know the extent to which those costs are inflated by compensation terms that violate the pay comparability policy of 39 U.S.C. §§ 101 and 1003, the subject of Questions 11-13. The current existence and magnitude of the compensation premiums is relevant to the Objectives 1 and 8, and Factors 11 and 14. The possibility that the Postal Service could narrow the compensation premium in future years and decades is relevant to those objectives and factors, as well as to the adequacy of the Postal Service's future revenue under Objective 5. Reply of MPA, ANM and PostCom at 12-14.

Likewise, the performance of the Flats Sequencing System, and the prudence and efficiency of the Postal Service's decisions to deploy the FSS, and continue using it despite its disastrous effects on the costs of processing flat-shaped mail (Question 14), are also relevant to Objectives 1, 5 and 8. Reply of MPA, ANM and PostCom at 12-14.

Finally, to make reliable year-by-year adjustments to the Postal Service's publicly reported financial data in light of the issues noted above, the Commission and the parties need the information covered by the second MPA-ANM motion for information requests, filed on January 25.

The Commission does not dispute the relevance of any of the requested information to the required "determinations of whether the [current regulatory] system is meeting the objectives, considering the factors." Order No. 3763 at 3. Nor does the Commission dispute that most if not all of the information cannot be obtained except by

propounding information requests or another form of discovery to the Postal Service, since much of the information is solely in the Postal Service's possession.[4]

The Postal Service's "representation" that "some" of the information sought in the January 17 motion "is generally publicly available" (Order No. 3763 at 3) is a tacit admission of this fact. A "representation" that information is available does not mean that it is in fact available. A statement that "some" of the requested information is publicly available implies that the rest of the information is not. And "generally" implies "not fully."

B. Resolving The Issues In Phase 1 Without Obtaining Relevant Information From the Postal Service Through Information Requests Would Be An Arbitrary Departure From Commission Practice In Other Informal Proceedings Since 2007.

Resolving the phase 1 issues without obtaining the information identified in the proposed information requests would also violate 5 U.S.C. § 706(2)(A) by departing arbitrarily from well-established Commission practice in other informal proceedings since 2007, when the ratemaking provisions of PAEA became effective. As the Commission is aware, pre-PAEA rate cases were formal on-the-record adjudications, with the full panoply of traditional discovery devices. *See* 39 C.F.R. §§ 3001.25 to 3001.28. After the enactment of PAEA, the Commission adopted more informal hearing procedures, without traditional discovery, for general rate cases and other proceedings involving market-dominant mail products. Order No. 26 in Docket No. RM2007-1, *Regulations Establishing A System of Ratemaking* (Aug. 15, 2007) at ¶ 2026. The Commission recognized,

[4] Moreover, even if data from other sources are publicly available, the Commission needs to know what the Postal Service's data show, so that inconsistencies between the Postal Service data and its litigation posture can be scrutinized and resolved.

however, that some form of discovery from the Postal Service would remain necessary to resolve complex factual issues, even in informal proceedings. The Commission's solution was to allow parties to move for the issuance of information requests by the Commission in its own name.

Commission-issued information requests, both participant-initiated and Commission-initiated, have become a staple of rulemakings and informal adjudications in the post-PAEA era. The Commission has issued information requests in every Annual Compliance Review proceeding since ACR2007, and virtually every rate case of general applicability since R2008-1. The Commission has also issued information requests in many rulemaking proceedings involving revenue or cost determinations. Since October 2014 alone, the latter dockets have included RM2015-2, RM2015-3, RM2015-4, RM2015-5, RM2015-7, RM2015-9, RM2015-11, RM2015-12, RM2015-13, RM2015-15, RM2015-16, RM2015-17, RM2015-18, RM2015-19, RM2016-1, RM2016-2, RM2016-7, RM2016-10, RM2016-11, and RM2016-12.[5]

The Commission has provided no cogent reason for abandoning this well-established practice in the present docket. The Commission's observations that this

[5] Indeed, when the Postal Service or another party proposes to change an existing analytical principle applied in the Postal Service's annual periodic reports to the Commission, the Commission's rules even allow parties to propound traditional discovery requests to the Postal Service to obtain relevant data that are not otherwise available. 39 C.F.R. § 3050.11(b)(2). When "technical issues are complex or controversial," and "technical conferences demonstrate a need for follow up in more depth, discovery requests will be entertained and, very likely, granted." Order No. 203 in Docket No. RM2008-4, *Notice of Final Rule Prescribing Form and Content of Periodic Reports* (April 16, 2009) at 12. In Docket No. RM2008-4, the Commission stated its intention to allow parties to obtain information first through technical conferences. The Commission has not offered such an option in this case.

docket is “unique” and required by statute (Order No. 3763), while true, are beside the point. Virtually every docket is unique in some sense. Most of the post-PAEA dockets in which the Commission issued information requests were specifically mandated by law or arose from a rate, classification or costing proposal that the Commission was legally required to consider. The Commission has not explained why these common circumstances weigh uniquely against information requests in *this* case.

The Commission has also not explained why the unidentified “time considerations” alluded to in Order No. 3766 (at 7) foreclose the issuance of information requests in phase 1. All of the Annual Compliance Review proceedings and nearly of the post-PAEA rate cases in which the Commission issued information requests were subject to relatively short deadlines for compiling a record and issuing a decision. *See* 39 C.F.R. §§ 3010.11(a)(5), (d), and (g) through (i) (deadlines for Commission review of general rate adjustments); 39 U.S.C. § 3653(b) (90-day deadline for annual compliance review). By contrast, 39 U.S.C. § 3622(d)(3) imposes no deadline at all on the completion of this case. Moreover, there can be no claim that the Postal Service would run out of operating cash if the Commission took the time for adequate fact-gathering through information requests. As the Commission knows, the Postal Service is currently generating an operating surplus, has done so without interruption for the past three years, and has accumulated approximately $8 billion in cash.

An agency’s failure to provide a good reason for departing from well-established post-PAEA practice violates “[o]ne of the core tenets of reasoned decisionmaking announced in *State Farm* … that ‘an agency changing its course … is obligated to supply a reasoned analysis for the change.” *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613

F.3d 1112, 1119 (D.C. Cir. 2010) (quoting *State Farm*, 463 U.S. at 42). An inadequately explained departure violates both the arbitrary and capricious standard of the APA, *see Dillmon v. Nat'l Transp. Safety Bd.*, 588 F.3d 1085, 1090 (D.C. Cir. 2009) ("agency action is arbitrary and capricious if it departs from agency precedent without explanation."), and the duty of an agency to explain its actions fully and clearly enough to allow an appellate court to provide informed review of an agency's reasoning. *See id.* at 1089 ("This permits us to ensure the agency's 'prior policies and standards are being deliberately changed, not casually ignored.'") (quoting *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003)); *LePage's 2000, Inc. v. Postal Reg. Comm'n*, 642 F.3d 225, 232-34 (D.C. Cir. 2011).

Indeed, a failure to issue party-initiated information requests in this case may be found so arbitrary a departure from well-establish Commission practice that the reviewing court may order discovery outright, rather than leaving the choice of information-gathering procedure to the Commission's discretion on remand. *See Vermont Yankee*, 435 U.S. at 542 (acknowledging in *dicta* that a totally unjustified departure from well-settled and long-standing agency procedures might require "judicial correction"); *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306, 308 n.1 (1st Cir. 1979) (rule allowing "judicial correction" may be applicable where agency deprived a non-agency party of procedural rights normally accorded).

II. MAKING THE OUTCOME OF PHASE 1 NONBINDING WOULD MAKE PHASE 1 REDUNDANT AND WASTEFUL.

The final reason offered by the Commission for not issuing information requests—that this omission is harmless because the Commission will "consider" requesting the

information at some later stage if the Commission "determines that additional information is necessary to facilitate its review" (Order No. 3763 at 3) is also illogical. Without the requested information, the Commission cannot make any valid determination of the extent to which the current system of regulation satisfies three of the most significant objectives of Section 3622(b): 1 (incentives for efficiency), 5 (revenue adequacy), and 8 (just and reasonable rates). Without valid phase 1 findings, the Commission cannot proceed to phase 2. While repeating phase 1 after issuing the information requests could ultimately lead to in a reasoned decision on the merits, the process would be needlessly costly for both the Commission and the parties. A phase 1 proceeding conducted without the requested information would be an idle exercise, a non-binding dress rehearsal for the performance of phase 1 that actually counted. This needless duplication of effort certainly would not be consistent with the Commission's asserted "needs in conducting this important review, including key time considerations and resource constraints." Order No. 3766 at 7.

III. THE COMMISSION SHOULD RECONSIDER ORDER NO. 3763 NOW, NOT AFTER PHASE I.

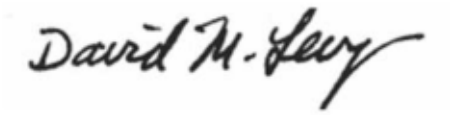
For the same reasons noted in Section II, judicial economy warrants reconsidering Order No. 3763 now, before the parties and the Commission invest more time and resources in this proceeding. If review of the Commission's refusal to issue information requests is deferred until the end of phase 1 (or, worse, the Commission's final decision in the case), phase 1 will need to be relitigated (unless, of course, the Commission finds that current regulatory system satisfies the objectives of 39 U.S.C. § 3622(b), and that no phase 2 is necessary). Hence, reconsideration of Order No. 3763 now could materially advance the ultimate resolution of this case. That is sufficient reason to resolve the issue

now. *See* 39 C.F.R. § 3001.1 (the Commission's rules "shall be liberally construed to secure just and speedy determination of issues"); *compare* 28 U.S.C. § 1292(b) (allowing federal district courts to certify an interlocutory order, including a discovery ruling, for immediate review by a Court of Appeals when the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation").

CONCLUSION

MPA and ANM respectfully request that the Commission reconsider Order No. 3763 and direct the Postal Service to answer the information requests proposed by the two parties on January 17 and 25, 2017.

Respectfully submitted,



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